

ARTICLES

Migratory Songbirds in the Mediterranean: Enforcement Catalysts or Europe’s Passenger Pigeons?

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ABSTRACT

Many European Union (EU) Member States struggle to control bird poaching, an activity that violates the Birds Directive. This Article focuses on two such states: Malta and Cyprus. A little more than ten years after their 2004 accession into the EU, Malta and Cyprus both still pose difficult questions—not only for the bird-protecting European states that originally enacted the Birds Directive, but also for the EU regulatory machinery. Conceptually, the problem does not differ from transboundary pollution—like clean air and water, birds are a shared natural resource. Whereas northern European bird-watchers enjoy migratory birds as a non-exhaustive and non-exclusive public good, significant numbers of communities within Mediterranean states exploit the birds for individual food consumption, depleting the resource. As the EU expands and includes more countries with a variation of environmental values, how can Member States promote internal enforcement of international environmental obligations? Through the lens of the Birds Directive, this article identifies the systemic regulatory problems that arise when Member States struggle to implement transposed laws (i.e., laws “on the books”). The article then outlines potential responses available, both for improved EU governance and for stronger wildlife advocacy.

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I. INTRODUCTION

Songbirds migrating between North Africa and Europe fly over pristine blue waters, but rest stops along the way can be harrowing. Europeans across the Mediterranean engage in bird poaching, violating the Birds Directive, one of the oldest pieces of European environmental legislation. Poaching this shared resource presents externality harms: northern European existence values have no voice in determining Mediterranean state governance. Conceptually, the externality problem does not differ from transboundary pollution—like clean air and water, birds are a shared natural resource. Whereas northern European bird-watchers use this resource as a non-exhaustive and non-exclusive public good, significant numbers of communities within Mediterranean states exploit migratory birds for individual consumption, depleting this resource. “Spring in the Old World is liable to fall silent far sooner than in the New.”¹

Many European Union (“EU”) Member States struggle to control bird poaching, but this Article focuses specifically on two: Malta and Cyprus. A little more than ten years after their 2004 accessions into the EU, Malta and Cyprus both still pose difficult challenges. These challenges exist not only for the bird-protecting European states that originally enacted the Birds Directive, but also for the EU regulatory machinery. As the EU expands and includes more countries with a variation of environmental values, how can Member States promote internal

1. Jonathan Franzen, *Emptying the Skies: A Reporter at Large*, THE NEW YORKER, 26 Jul. 2010, at 5; see Directive Article 12 Report for Cyprus, 1.2 (period 2008-2012) (reporting in 2014 that “[a]lthough progress has been made in comparison to 10 years ago, still the trapping numbers remain at unacceptable levels.”) [hereinafter Cyprus 12 Report].

enforcement of international environmental obligations? Through the lens of the Birds Directive, this article identifies the systemic regulatory problems that arise when Member States struggle to implement transposed laws (*i.e.*, laws “on the books”). The article then outlines potential responses available for improving both EU governance and wildlife advocacy.

II. MALTA AND CYPRUS THREATEN TO BRING DOWN THE BIRDS DIRECTIVE

Within the Birds Directive framework, the Mediterranean is a key geographic area. Every spring and autumn, the sky fills with birds trekking between their wintering grounds in northern Africa and summer roosts in Europe.² Malta and Cyprus, like other EU Member States, have certain populations that are actively hostile to the Birds Directive and to the species that the Directive aims to protect.³ But Malta and Cyprus present unique issues, both in their geography and their relationships with the EU regulatory framework. The migratory bird flyway bottlenecks on these Mediterranean islands, which provide scarce patches of land where birds stop to rest.⁴ In 2010, BirdLife Malta director Tolga Telmuge explained the problem that Malta and Cyprus both pose to the EU and its Birds Directive in a statement about Malta:

The European hunting organization and BirdLife International did a lot of hard work to arrive at sustainable hunting limits, and then Malta joins the E.U., as the smallest member state, and threatens to bring down the whole edifice of the excellent Birds Directive. Malta’s disregard for it is setting a bad precedent for other member states.⁵

Both Cypriot and Maltese populations view bird hunting and trapping with nationalist pride. In Cyprus, a popular traditional dish is pickled or boiled blackcaps, called *ambelopoulia*. The dish’s heritage, coupled with weak enforcement of the Birds Directive, creates a strong black market for *ambelopoulia*, forcing restaurant raids by Cyprus’s Game Fund.⁶ Cypriot media and political opinion have sided with the restaurants; the record for *ambelopoulia* eaten in one

2. Hahn et al., *The natural link between Europe and Africa—2.1 billion birds on migration*, 188 *OIKOS* 624, 626 (2009) (arriving at the “impressive number of 2 billion passerines and near-passerine birds migrating from the European continent to sub-Saharan Africa in autumn each year,” but finding that this estimate is only half of the estimated number of migratory birds taking the same route in the 1950s).

3. BIRDLIFE INTERNATIONAL, *MEDITERRANEAN/BLACK SEA FLYWAY FACTSHEET* 4 (2010) (“On the Maltese Islands alone an estimated 4 million birds are killed each year.”).

4. Jacques Blondel & James Aronson, *BIOLOGY AND WILDLIFE OF THE MEDITERRANEAN REGION* 244 (1999) (“Areas of intensive hunting closely correspond with important migration routes, especially ‘bottlenecks’ where geographical features such as narrow straits and mountain ranges cause birds to be channeled through small areas . . .”).

5. Franzen, *supra* note 1, at 6 (statement of Tolga Telmuge).

6. *Id.* at 3.

sitting is held by a politician in north Cyprus.⁷ Cypriots trap blackcaps with mist nets and lime-sticks; the latter method dates to the sixteenth century. Both forms of trapping create enormous bycatch, and the EU's 2014 assessment of Cyprus's implementation of the Birds Directive from 2008-2012 found that the most important challenge to the directive is illegal trapping.⁸ Interestingly, Cyprus's trapping epicenter is on land leased to a northern Member State, the United Kingdom. Local Cypriots deploy many traps on a British military base in Cape Pyla.⁹

The powerful class in Malta, by contrast, is mostly anti-hunting. This class views bird hunting as a deterrent to tourism, the island's economic driver.¹⁰ Yet the anti-hunting perspective of Malta's elites has created a counter-culture, with the hunting lobby garnering youth support through anti-EU rhetoric.¹¹ The European approach has made an impact, as the European Court of Justice ("ECJ") and the European Commission recently allowed Malta a derogation to license hunting of certain songbirds.¹² As part of the derogation, Malta must supply police officials and hunting marshals to enforce the total spring hunting limit, which is determined by the number of birds hunted the previous autumn.¹³ Like Cyprus, a portion of the Maltese population sees killing birds as a tradition.¹⁴

Although Malta and Cyprus acceded to the EU at the same time, the two states have diverged in their level of engagement with the EU regulatory regime. While Malta was a party to a Birds Directive infringement proceeding at the ECJ in 2008, Cyprus has only received warnings from the Commission.

III. THE BIRDS DIRECTIVE WITHIN THE EUROPEAN UNION LEGAL FRAMEWORK

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ("Birds Directive"), signed in

7. *Id.*

8. Cyprus Article 12 Report, at 1.2, *supra* note 1 (discussing Cyprus' achievements under the directive).

9. Franzen, *supra* note 1, at 3; *see also* Cyprus Article 12 Report, *supra* note 1, at 2.2 (describing the British Sovereign Base areas in Cyprus as areas of significant challenge for implementation of the Birds Directive).

10. *See, e.g.*, MALTA'S NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN: 2012-2020, at 2 ("The conservation and sustainable use of biodiversity has a positive impact on the standard of living and on *sectors such as tourism* that are central for generating commercial activity and employment.") (emphasis added).

11. Franzen, *supra* note 1, at 5 (quoting from the hunting lobby F.K.N.K.'s newsletter as stating that bird policing should "not be done by arrogant extremists who think Malta is theirs because it's in the EU").

12. Annaliza Borg, *Hunters Start Submitting Applications for this Season*, MALTA INDEPENDENT ONLINE (Apr. 5, 2011), <http://www.independent.com.mt/articles/2011-04-05/news/hunters-start-submitting-applications-for-this-season-290302/>.

13. Birds Directive Article 12 Report for Malta 1.1 (period 2008-2012) [hereinafter Birds Directive]; *see also* Kurt Sansone, *No EU 'Deal' on Spring Hunting*, TIMES OF MALTA (Apr. 3, 2011), <http://www.timesofmalta.com/articles/view/20110403/local/no-eu-deal-on-spring-hunting.357985>.

14. EU Environment Commissioner recently conceded that conservation of wild birds was an "extremely controversial" topic in Malta. Tim Diacono, *Opening Finch Trapping will Land Malta in Court—Karmenu Vella*, MALTA TODAY (Jun. 12, 2015 12:54 PM), http://www.maltatoday.com.mt/news/national/53996/malta_must_consider_doves_vulnerable_status_when_explaining_hunt_derogation__vella#.Vpln_VI8r-8.

Bonn, Germany in 1979, traces its roots to an earlier age. In 1974, the European Commission recommended that all Community states accede to the 1950 Paris Convention on Birds. At the same time a group of leading wildlife organizations presented a petition “on the need to save migratory birds.”¹⁵ The Directive’s age highlights its centrality to European law; it was passed almost a decade before the Single European Act gave the Community clear competence in nature legislation.¹⁶ Its preamble acknowledges the spillover attributes of birds as a natural resource, calling their protection “a trans-frontier environment problem entailing common responsibilities”¹⁷ and requiring regulatory measures to “be coordinated with a view to setting up a coherent whole.”¹⁸

For this article, the relevant Birds Directive sections are Articles 4, 7, 8, and 9. Article 7 institutes hunting regulations and only allows national legislation authorizing hunting for birds found in Annex II.¹⁹ States are prohibited from allowing hunting of migratory species “during their period of reproduction or during their return to their rearing grounds.”²⁰ The Directive bolsters restrictions on hunting by requiring states to “prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds.”²¹ However, Member States may derogate from these restrictions for a variety of reasons detailed within Article 9, “where there is no other satisfactory solution.”²² Such derogation must be “strictly necessary” and proportionate to the objective of conservation of the species.²³

The Birds Directive also imposes positive obligations on Member States. With regard to Annex I species, states must provide special protection areas (“SPAs”) that “ensure [the species’] survival and reproduction in their area of distribution.”²⁴ Annex I is a constantly updated list of species viewed as both endangered and migratory. For those species in Annex I, the ECJ defines state obligations to include a “coherent [national] legal system capable of specific and comprehensive sustainable management and effective protection” of habitat areas and the

15. Wouter P.J. Wils, *The Birds Directive 15 Years Later: A Survey of the Case Law and a Comparison with the Habitats Directive*, 6 J. ENVTL. L. 219, 219-20 (1994).

16. James Friedberg, *Views of Doñana: Fragmentation and Environmental Policy in Spain*, 3 COLUM. J. EUROPEAN L. 1, 28 (1997).

17. Birds Directive, *supra* note 13, Preamble (4).

18. *Id.* at Preamble (8).

19. Annex II birds may be hunted “[o]wing to their population, geographical distribution, and reproductive rate throughout the community.” Case C-135/04, *Comm’n v. Spain*, 2005 ECR I-5274.

20. Birds Directive, *supra* note 13, at art. 7(4). In the case of Malta and Cyprus, migratory birds return to their rearing grounds when flying north in the spring.

21. *Id.* at art. 8(1).

22. Directive 2009/147/EC, art. 9(1)(a), http://ec.europa.eu/environment/legal/law/2/module_2_9.htm. Reasons for derogating may include the interests of public health and safety, air safety, food and water safety, protecting flora and fauna, interests in research and teaching, and to permit “on a selective basis, the capture keeping or other judicious use of certain birds in small numbers.” *Id.*

23. C-76/08, *Comm’n v. Malta*, para. 58, 65 (10 Sept. 2009).

24. Birds Directive, *supra* note 13, at art. 4(1).

birds within them.²⁵ Area designations must be based on objective, verifiable scientific criteria. Where information is lacking, the Commission relies on BirdLife International's compilation of national inventories of important bird areas ("IBAs").²⁶ While not binding, the ECJ has found IBAs to be a valid reference point in reviewing a Member State's number and size of SPAs.²⁷

The EU has a distinctive supranational legal and administrative structure, separate from a typical international regime.²⁸ Three bodies comprising EU Member States work together to create directives and regulations, which are the central forms of EU law. Generally, the Commission proposes and the Council and Parliament work jointly to pass new legislation.²⁹ Every country within the EU has one representative on the Commission, while the Council and Parliament have a weighted decision-making process. For example, in the Parliament—which, aside from its legislative duties, supervises other EU institutions and jointly manages the budget³⁰—Malta and Cyprus each hold 6 of 751 seats, tying for the least number of seats for any Member State.³¹ In contrast, large concentrations of votes and seats belong to the more northern EU countries, which provide the habitat for migratory birds during their mating, singing, and breeding seasons.

Treaties defining the bounds of the EU confer shared competence between the Union and Member States in the area of the environment.³² Under shared competency, both the EU and Member States may legislate and adopt binding acts.³³ However, Member States may not legislate in areas where EU legislation has taken the field.³⁴ The Birds Directive, as "one of the few and one of the earliest pieces of nature legislation,"³⁵ is the paradigmatic example of EU environmental field clearance. In fact, the Birds Directive came into existence

25. Case C-166/04, *Comm'n v. Greece*, 2005.

26. See Press Release, European Comm'n, IP/07/938, *Nature prot.: Commission Takes Legal Action Against 11 Member States over Protected Bird Areas* (June 27, 2007); see also Cyprus Article 12 Report, *supra* note 1, at 6.2.1 ("In 2013, BirdLife Cyprus started a Common Birds Monitoring Programme, with funding partly drawn from a contract with the Cyprus Agricultural Ministry . . . The BirdLife Cyprus programme is an amalgamation of two pre-existing programmes and covers over 100 sampling sites (stratified by habitat) in the area of the island under effective Government control.")

27. *Id.*

28. See generally Richard B. Stewart, *Enforcement of Transnational Public Regulation* (Robert Schuman Ctr. for Advanced Studies, EUI Working Papers 49, 2011).

29. See generally *Law Making, EU Institutions and Other Bodies*, European Union, http://europa.eu/about-eu/institutions-bodies/index_en.htm#goto_4 (last visited Jan. 15, 2016).

30. Heather Lanham, *The Effect of EU Enlargement on the Environment: A Look at Malta*, 16 *COLO. J. INT'L ENVTL. L. & POL'Y* 467, 474 (2005).

31. See European Parliament, *Results of the 2014 European Elections, Seats by Member State*, <http://www.europarl.europa.eu/elections2014-results/en/seats-member-state-absolut.html> (last visited Oct. 6, 2015).

32. Consolidated Version of the Treaty on the Functioning of the European Union art. 4(2)(e), May 9, 2008, 2008 O.J. (C115) 47 [hereinafter TFEU].

33. See *id.* at art. 2(2).

34. *Id.*

35. Friedberg, *supra* note 16.

before the EU solidified competence to legislate in the environmental area,³⁶ instead assuming jurisdiction based on the transborder nature of migratory species.

To join the EU, countries like Malta and Cyprus were required to sign accession agreements.³⁷ Because nature directives are relevant and sometimes at odds with implementation of other EU policies,³⁸ the EU requires immediate implementation of the Birds Directive.³⁹ As a result, natural resource protection often infiltrates negotiations over EU enlargement; accession even provides an opportunity to amend a Directive. It is hotly disputed within Malta whether the government and the Commission negotiated a derogation to the Birds Directive for spring hunting during the Accession Treaty Agreement.⁴⁰

Upon EU legislation (or later accession), the Commission is required to ensure that Member States fulfill their implementation obligations.⁴¹ The three stages of implementation include: transposition, conformity, and application.⁴² The stages overlap, which can make it difficult for the Commission to identify and prosecute specific Member State breaches. Yet categorizing the stages helps to create distinctions that will highlight how Malta and Cyprus are each failing to implement the Birds Directive. First, Member States must *transpose* EU legislation into national law “so that relevant rights, duties and obligations” are written into the states’ legal orders.⁴³ Second, Member States *conform* the transposed laws with EU law, so that the resulting rights are correct, complete, and apply to the states’ entire areas.⁴⁴ Finally, Member States must *apply* the conformed laws in state practice.⁴⁵

The Commission prioritizes prosecution of non-conformance and non-transposition, yet most cases it ultimately brings to the ECJ, including Birds

36. The EU gained competence to legislate over environmental matters via the Single European Act of 1986.

37. See Treaty of Accession 2003, Apr. 16, 2003, 2003 O.J. (L 236).

38. For example, EU structural and agricultural policies undertaken on their own can cut into the objectives of nature laws such as the Birds and Habitats Directive.

39. See European Commission, *The Habitats Directive*, http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm (last visited 5 Aug. 2015). The one exception to immediate implementation is Malta, which received a strictly limited transition period for the trapping provision of the Birds Directive (until 2008). *Id.*

40. *BirdLife Malta Refuses to Participate in Today's Ornis Meeting*, GOZO NEWS (Mar. 29, 2011), <http://www.gozonews.com/17074/birdlife-malta-refuses-to-participate-in-todays-ornis-meeting> (last visited Jan. 15, 2016).

41. Molly Elizabeth Hall, *Environmental Law in the European Union: New Approach for Enforcement*, 20 TUL. ENVTL. L. J. 277, 290 (2007).

42. *Id.* (citing EC Treaty art. 266).

43. Elizabeth Hattan, *The Implementation of EU Environmental Law*, 15 J. ENVTL. L. 273, 274 (2003).

44. *Id.*

45. *Id.*

Directive compliance failures, arise from non-application.⁴⁶ The line between non-application and non-conformance appears particularly blurred where, as seen with the Birds Directive in Malta and Cyprus, the root of compliance failure is cultural and political. The existence of national laws that do not protect entire areas of the Member State may amount to a failure to conform to the EU Directive, or they may be an under-enforcement application breach.

While the Commission is responsible for ensuring that states fulfill the three stages of implementation, it does not have the means to create an environmental inspectorate that thoroughly investigates Member State actions. Rather, the Commission relies on national reports, ad hoc complaints, and questions from Parliament.⁴⁷ Because national governments can and do influence the Commission's investigation and enforcement process, Member States that most forcefully oppose implementation of a proposal are more likely able to avoid enforcement.

IV. VERTICAL INTERPENETRATION: ENFORCEMENT FROM ABOVE

A. THE EUROPEAN COMMISSION AND THE EUROPEAN COURT OF JUSTICE

In enforcing Directives over Member States, the EU operates within a separation of powers framework. The two central institutions are the Commission and the ECJ. They work together to interpret and enforce state implementation of laws and regulations created by the Council and Parliament.

In pursuit of enforcement duties, the Commission can be generally analogized to the ICC prosecutor:⁴⁸ The Commission has wide discretion to commence infringement proceedings,⁴⁹ and often a threat of investigation will encourage state compliance.⁵⁰ Its broad discretion means there is no line between the

46. Hattan argues that this arises because many cases could fall within any of the three implementation failures—yet an effects-based non-application claim can easier show how non-compliance is of “major importance.” *Id.* at 287.

47. Hattan, *supra* note 43.

48. See Michael Scharf & Patrick Dowd, *No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and Other Human Rights Courts*, 9 CHI. J. INT'L L. 573, 597 (2009) (“[O]nce a case is referred to the ICC, the Prosecutor must ‘conduct an analysis’ and evaluate the information made available to him; determine whether there is a reasonable basis to proceed and commence an investigation; ‘notify all States Parties and those States which . . . would normally exercise jurisdiction over the crimes concerned’; and, finally, initiate an investigation.”) (quoting Rome Statute of the International Criminal Court, arts. 18(1) & 53(1), 37 ILM 999 (1998)).

49. See Roberto Mastroianni & Andrea Pezza, *Striking the Right Balance: Limits on the Right to Bring an Action under Article 263(4) of the Treaty on the Functioning of the European Union*, 30 AM. U. INT'L L. REV. 743, 775 (2015) (“[A]ccording to the [European Court of Justice’s] case law, the Commission enjoys full discretion in deciding whether or not to commence infringement proceedings and to refer a case to the Court.”).

50. See Ronan Long, *The Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services*, 29 J. ENERGY & NAT. RES. L. 1, 41-42 (2011) (noting “the deterrent effect of infringement proceedings” but acknowledging that Member States have considerable discretion to prescribe penalties for violations of transposed international environmental obligations).

Commission's political nature and its enforcement duties. Two examples show the discretion. First, during investigation, the Commission can negotiate standards for a Member State that, if followed, will keep the state out of an infringement proceeding.⁵¹ Second, if the Commission does bring the Member State to the ECJ and penalties are at stake, the Commission has the flexibility to determine the proportionality and seriousness of the infringement, thereby affecting the amount of the fine.⁵² Such powers display how the Commissioner is the "guardian of [EU] treaties" and laws, shaping Member States' obligations.⁵³

As an enforcement sword against Member State non-compliance, the Commission has two major shortcomings. First, it lacks both an inspectorate and sufficient powers of inspection. Second, neither Parliament nor NGOs can challenge the Commission's decision to pass on an investigation or halt an infringement proceeding.⁵⁴ The Commission's broad discretion, limited inspection power, and minimal transparency provide targeted states with strong domestic political arguments and the rhetoric of unfairness.

The ECJ enters the enforcement frame when the Commission presents it with an infringement action. The ECJ can either make a declaratory judgment about whether a Member State is in violation of an EU law, or—thanks to the development of Article 260—issue a monetary penalty.⁵⁵ Within its declaratory capacity, the ECJ makes pronouncements on how to interpret Directives,⁵⁶ showing that it can also shape treaties and laws.

The ECJ's relatively new capability to issue fines has created its own separation of powers dispute, highlighted by two Advocates-General ("AG") opinions in *Case C-387/97, Commission v. Hellenic Republic*. One AG argued that the ECJ could not depart from Commission guidance, because doing so would reduce the Commission to an *amicus curiae*; enable the ECJ to set "political priorities" within the EU; and eliminate the opportunity of the Member

51. See Malta example in the following section on Article 260 enforcement.

52. Levente Borszák, *Punishing Member States or Influencing Their Behavior or Iudex (non) calculat?*, 13 J. ENVTL. L. 235, 248 (2001).

53. Case C-76/08, *Comm'n v. Malta*, para. 20.

54. Brian Jack, *Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties*, 23 J. ENVTL. L. 73, 79-80 (2011). Note that here the analogy to the ICC Prosecutor fails. If the Prosecutor initiates an investigation and decides against further proceedings, the Pre-Trial Chamber will review the decision. Here, the Commission need not justify, nor even publicly announce, its decision to drop an infringement action. Commentators have noted that this closed door nature of initiating and dropping investigations, coupled with growing "teeth" of Article 260 penalties, makes the Commission susceptible to political abuse. Jack describes the Commission's closure of a Birds Directive infringement action against Germany after the German Chancellor wrote the Commission President.

55. See Hall, *supra* note 41, at 290 (explaining in 2007 that "[i]t has only been within the last fifteen years that the Community had financial penalties available for failure to comply, and only in the last six years that the institutions of the EU were willing to use them.")

56. For example, the ECJ explained the test for Birds Directive Article 7 (hunting) derogations in its judgment of C-76/08, *Comm'n v. Malta* (2009).

State to defend against a fine.⁵⁷ The Court ultimately opposed this rationale. It followed AG Fennelly, who argued that the financial liability arises from failure to comply with an ECJ judgment.⁵⁸ Thus, the Court holds the power to fine. The Court's decision has been incorporated into Article 260, which implies that the Court may veer from the Commission's proposed penalty fine.⁵⁹ The ECJ's broad discretion provides more uncertainty to Member States, such as Malta and Cyprus, which could potentially be hauled before the ECJ for their failure to enforce the Birds Directive.

B. ENFORCEMENT USING FINANCIAL PENALTIES UNDER ARTICLE 260

In 1993, the Masstricht Treaty provided the ECJ with the power to impose financial penalties to enforce a Member State's compliance with EU laws and regulations, "clos[ing] a legal vacuum."⁶⁰ To reach a point of imposing penalties, the Commission and ECJ must take many steps. The Commission sends a letter of formal notice to the accused Member State, following up with a "Reasoned Opinion" if the state does not adequately respond.⁶¹ Reasoned Opinions identify points of non-compliance and give time limits for future compliance, threatening referral to the ECJ.⁶² If the Reasoned Opinion similarly fails to motivate the state into remedial action, the Commission may then decide to refer the matter to the ECJ.⁶³ The Court may then issue a declaratory judgment explaining if and how the state is in non-compliance.

Article 260 actions begin when the Commission believes a Member State has not taken the measures to comply with an ECJ judgment.⁶⁴ The ECJ requires that compliance following a declaratory judgment "must be initiated at once and completed as soon as possible."⁶⁵ If the Commission finds no such action occurred, it must send a letter of notice to the state. The process is streamlined compared to the declaratory infringement proceeding—the Commission need not follow up with a Reasoned Opinion.⁶⁶ If the Member State fails to provide a satisfactory response to the notice, the Commission may ask for a penalty. The

57. Borszák, *supra* note 52, at 256 (describing the Opinion of AG Colomer).

58. *Id.* at 257.

59. TFEU, art. 260(2). The language of art. 260(2) does not limit the Court to impose a penalty payment "not exceeding the amount specified by the Commission," as it does in art. 260(3). Article 260(3) enables the Commission to immediately seek a fine for Member States that fail to transpose a Directive, without first gaining an ECJ declaratory judgment.

60. Jack, *supra* note 54, at 73.

61. Hattan, *supra* note 43, at 275 n.10.

62. Borszák, *supra* note 52, at 246.

63. Only twenty percent of Commission letters of formal notice are ultimately referred to the ECJ. *Id.*

64. See Peter Davies, *Iceland and European Union Accession: The Whaling Issue*, 24 GEO. INT'L ENVTL. L. R. 23, 54 (2011) ("If the ECJ rules against Iceland and Iceland fails to comply with the ruling, the matter can be brought before the ECJ by the Commission whereupon the Court can impose a lump sum or penalty payment.") (citing TFEU, art. 260(2)).

65. Case C-387/97 Comm'n v. Greece, 2000 E.C.R. I-5047.

66. Jack, *supra* note 54, at 82.

Commission may request either daily fines or a lump sum payment.⁶⁷ The two options have separate underlying justifications.

Lump sum penalties against Member States are retrospective, justified by accountability and retribution rationales. Lump sums are particularly applicable when a Member State moves to comply with obligations only shortly before a penalty judgment is given.⁶⁸ The lump sum thus compensates the EU for not only Community losses due to breach, but also for the costs from the infringement proceedings. In other words, a lump sum is a more effective remedy against Member States who hold off on complying with an EU law until the real threat of a financial penalty. To determine an amount that achieves such retrospective goals, the Court looks at factors such as seriousness,⁶⁹ duration of violation, timing between the initial ECJ judgment and Commission action, and Member States' ability to pay.⁷⁰ The seriousness factor particularly relates to the *importance* of the EU law that the Member State has failed to implement.

On the other end, daily fines better fit a deterrence rationale. If strong enough, the fines will provide a Member State *ex ante* incentive to resolve the non-compliance as quickly as possible. As it does with lump sum determinations, the Court looks at seriousness to calculate daily penalty payments.⁷¹ The durational element and timing elements are less important; the durational factor is not based on the historical impact of the compliance breach, but rather acts as an indicator of the urgency of remedying the infringement.⁷²

A question arises as to what constitutes a Member State in Article 260. For environmental laws, the “polluter” paying an Article 260 financial penalty is the state itself.⁷³ State liability occurs regardless of whether the responsible agency is a public or private emanation of the state. Thus, one agency within a Member

67. Alexander Kornezov, *Imposing the Right Amount of Sanctions Under Article 260(2) TFEU: Fairness v. Predictability, Or How to Bridge the “Gaps”*, 20 COLUM. J. EUR. L. 307, 310-11 (2014) (describing the Commission’s methodology for “calculating the amount of lump sum and periodic penalty payments assessed upon recalcitrant Member States”).

68. Borszák, *supra* note 52, at 253.

69. Here, the Court has incorporated private state liability case law, by using the *Franco* factors to determine “seriousness.” The factors include: clarity of rule infringed, intentionality, excusability of error of law, and what position other EU institutions have taken on the Member State’s violation. Jack, *supra* note 54, at 89.

70. Interestingly, the Commission determines ability to pay based on both a Member State’s gross domestic product and voting strength within the Council. Voting strength may loop into the calculus because (1) it loosely indicates a country’s consent to the legislation, or (2) it indicates how well a Member State will fare in the political process if it fails to pay the ECJ penalty.

71. Kornezov, *supra* note 67, at 310 (“The Commission proposes that penalty calculations should be based on three fundamental criteria: the seriousness of the infringement; its duration; and the need to ensure that the sanction is itself a deterrent against further proceedings.”).

72. Jack, *supra* note 54, at 88 (citing Advocate-General Fennelly in C-197/98 Comm’n v. Greece).

73. See, e.g., Davies, *supra* note 64, at 54-55 (describing how the ECJ could impose a lump sum penalty against Iceland if Iceland acceded to the EU and its whaling practices violated the species protection provisions of the Habitats Directive).

State may continue to fail to implement an environmental ECJ judgment while spreading the cost across the entire government. While this form of penalty may dilute the penalty that the responsible agency experiences, and therefore limit the penalty's deterrence, the spread out penalty can also motivate other governmental actors to apply third-party pressure upon the agency.

C. THE LIKELIHOOD OF APPLYING ARTICLE 260 FINANCIAL PENALTIES TO MALTA
AND CYPRUS

Both Malta and Cyprus have had repeated interactions with the Commission over their implementation of the Birds Directive. Though both Member States have similar implementation shortcomings, the Commission has followed different enforcement tacks. The Commission has only brought Malta to the ECJ for an infringement proceeding. These separate tacks bring to light the risks inherent in the Commission's prosecutorial discretion power. By successfully pursuing an ECJ decision finding Malta's spring hunting in violation of the Birds Directive, the Commission positioned itself well to negotiate a Birds Directive derogation with Malta. By contrast, even though Cyprus presents the same—if not more severe—poaching threats, the Commission has not initiated enforcement proceedings against Cyprus for violation of the Birds Directive. Instead, the Commission has brought Cyprus to the ECJ for failure to protect the grass snake, a species that shares habitat with migratory birds. The following subsections investigate the ramifications of the Commission's alternate enforcement paths, and conclude that each approach provides the Member States with loopholes to avoid migratory bird obligations.

1. Malta

The problem of “Maltese plumage”⁷⁴ was well known within and beyond Malta's borders before the state joined the EU. Debates over the consequences of incorporating the Birds Directive took place during Malta's accession negotiations. Civil society groups within Malta dispute whether the Commission and European Community at large were aware of Malta's intent to not fully comply with the Directive.⁷⁵ Malta and the EU are currently roiled in debate over an issue stemming from the accession negotiations: whether Malta can issue a spring

74. “When bird-watchers in Italy see a migrant that's missing a chunk of its wing or its tail, they call it ‘Maltese plumage.’” Franzen, *supra* note 1, at 5. Perhaps this gives new meaning to the Dashiell Hammett novel, in which multiple humans are shot over a Maltese bird? See DASHIELL HAMMETT, *THE MALTESE FALCON* (1929).

75. See Press Release, FKNK, Unjust ECJ Decision (Apr. 25, 2008), http://www.huntinginmalta.org.mt/uploads/53/271/PR_ECJ_INTERIM_MEASURES_DECISION.pdf (last visited Jan. 15, 2016).

hunt.⁷⁶

The Birds Directive clearly outlaws spring hunting.⁷⁷ The Maltese hunting lobby, however, successfully pushed Malta's government to allow hunting in the spring, arguing that autumn yields are insufficient.⁷⁸ In response, the Commission asked the ECJ for interim measures, banning spring hunting in 2008.⁷⁹ Massive outcry occurred a year later, when the ECJ delivered a verdict denying Malta derogation⁸⁰ from the spring hunting ban. The Court found that Malta's spring hunting proposal allowed a "disproportionate" number of birds to be killed.⁸¹ Following the denial, "government negotiators went into overdrive,"⁸² setting up a quasi-"deal" with the Commission where Malta can now set up a proportionate spring season. The two entities agreed on framework legislation with a maximum number of turtledoves and quails set aside for any one year.⁸³ Beyond the framework, Malta must justify the spring hunting every year and incorporate safeguards such as a very short season, maximum bag count, and the provision of monitoring marshals.⁸⁴

Malta's spring hunt showcases the roles of each entity within the EU enforcement mechanism: the Commission, the ECJ, and the Member State. The ECJ's ruling that Malta's attempted derogation violated the Birds Directive gives the Commission a stronger hand; the Commission can now negotiate a spring hunting season with the threat of financial penalties arising from an infringement proceeding. In this sense, the Commission truly does become the guardian of the EU treaties. For example, if the Commission allows a derogation hunting season—by, say, declining to initiate a proceeding against Malta—then its decision to forego enforcement may guide other hunter-friendly countries as to the boundaries of a potential allowable derogation of Birds Directive Article 7.

Malta may argue that the underlying threat of financial penalties under TFEU Article 260 no longer exists because Malta's remedy to the problems of C-76/08, *Commission v. Malta*, was "initiated at once and completed as soon as pos-

76. In the ECJ case, Malta argued that it would not have acceded to the EU had the state not received the impression it could hunt in the Spring. C-76/08 Comm'n v. Malta, para. 35.

77. Case C-135/04, Comm'n v. Spain, 2005 ECR I-5275. "In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds." *Id.*

78. See C-76/08 Comm'n v. Malta, para. 39.

79. Press Release, European Commission, Court Orders Ban on Spring Hunting in Malta (Apr. 25, 2008), http://europa.eu/rapid/press-release_IP-08-647_en.htm.

80. Article 9 of the Birds Directive allows for derogation of hunting restrictions in Article 7, so long as the action is necessary and all other Directive objectives are being met. C-76/08 Comm'n v. Malta, para. 58.

81. Editorial, *Hunting Compromise that Must be Enforced*, TIMES OF MALTA, Mar. 30, 2011, at 9.

82. *Id.*

83. Sansone, *supra* note 13.

84. See *id.* Note that Malta may no longer permit hunting of turtledoves, as the International Union for the Conservation of Nature recently categorized turtledoves as "vulnerable" on its Red List of threatened birds. EU Environment Commissioner Vella explained in June 2015 that Malta must take the bird's "vulnerable" status into account when submitting a derogation for 2016 spring hunting. See, e.g., Diacono, *supra* note 14.

sible.”⁸⁵ Thus, the ECJ ruling should only give rise to penalties for actions related to the 2008 spring hunting derogations.⁸⁶ Because the issue was remedied through negotiation in the spring of 2011, any subsequent infringement proceeding should only lead to declaratory judgment. However, the Commission’s strongest response would argue more broadly that the ECJ judgment concerned spring hunting in Malta, so *any* spring hunting problem should be seen as a failure to comply with the ECJ judgment. Since the judgment itself is the baseline, the ECJ would have the power to fine.⁸⁷

Were the Commission to decide that the degree of Malta’s derogation gives rise to a financial penalty proceeding, it would use TFEU Article 260(2).⁸⁸ Pointing to the seriousness factor, the Commission would argue that the Birds Directive is one of the oldest EU environmental laws, indicating its “core value” nature. The historical roots of the Birds Directive, coupled with its birth from an international treaty, limits Malta’s argument about lack of consent upon accession. Further, because the ECJ has spoken and the Commission has heavily engaged Malta in discussions to limit the hunting of birds, the Commission would argue that the legal rules are clear and any error of law is not excusable.

Malta would respond that *precisely because* there has been so much negotiating over what does or does not constitute an Article 9 derogation, the “seriousness” of marginally crossing the line should not be high. Further minimizing seriousness would be Malta’s progress towards compliance with the judgment and the fact that the Commission is at least allowing derogation. Because the Commission is willing to bend, the degree of danger must not be high.⁸⁹ In addition, Malta would argue (as it attempted to do in the initial ECJ case) that the preeminent international body on threatened species classified the targets of Malta’s derogation—quail and turtledove—as species of “least concern.”⁹⁰ Such deference to other bodies fits within the *Francovich* principle case law calculation of seriousness.

85. *Comm’n v. Greece*, para. 82.

86. Subsequent EU practice concerning Maltese trapping supports this argument. In May 2015, the Commission announced that it was sending Malta’s Prime Minister a Reasoned Opinion explaining why Malta’s reopening of finch trapping is in breach of EU law. *EU to Tell Musca to Ban Trapping or Face Court*, MALTATODAY (May 18, 2015), http://www.maltatoday.com.mt/news/national/53063/eu_to_tell_muscat_to_ban_trapping_or_face_court#.VpQZS1I8r-8.

87. Borszák, *supra* note 52, at 257.

88. TFEU Article 260(2) states: “If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.”

89. *See* Jack, *supra* note 54, at 84.

90. C-76/08 *Comm’n v. Malta*, para. 43 (referencing the International Union for the Conservation of Nature and Natural Resources).

Malta would also advance arguments related to its ability to pay. Ability to pay considers a Member State's gross domestic product and Council voting strength.⁹¹ Malta can argue that because it has minimal governmental funds, financial penalties would significantly harm its capacity to build institutions to better regulate hunting activity.⁹² Thus, imposing a fine for overextending derogation will hurt bird protection in Malta. Further, Malta public sentiment is currently pro-conservation. A strong financial penalty has the potential to stoke the population's ire and send the Maltese population towards distrust of a "Big Brother" EU. Strong deterrence is a double-edged sword.

The voting strength prong of "ability to pay" gives Malta room to argue that its limited Council power realistically means only superficial consent to EU legislation. But while this implication can justify reducing some Article 260 fines, it should not support reductions for violations of legislation pre-dating accession. The Birds Directive existed when Malta sought accession, yet Malta still entered into the EU. Accompanying economic benefits of EU membership are overarching EU obligations like the Birds Directive. After having lost in Malta's political process when Malta acceded into the EU, the hunting lobby should not get another shot in the ECJ.

Ultimately, the negotiations over Malta's spring hunting derogation may be a distraction from the larger problem—Malta's failure to enforce at the ground level.⁹³ Under-enforcement of lime-stick traps, other indiscriminate hunting, and the black market for stuffed trophy birds underlie Malta's non-application violations. Perhaps because of the spring hunt concession, Malta's hunters will adhere to the law. But if the local enforcement mechanism is lacking, why should the EU expect hunters to restrain themselves?

The Commission may have recognized these issues in its negotiations over the spring hunt, using the threat of future sanctions to require local enforcement marshals.⁹⁴ The spring hunt derogation can also help fix non-application in Malta through two other means. First, by increasing the maximum bag limit and allowing hunting in a more plentiful season, the derogation gives more hunters

91. Kornezov, *supra* note 67, at 311 (describing ability to pay as the "n" factor in the Commission's financial penalty formula). According to Kornezov, the Commission periodically revises the ability to pay levels, and, as of 2012, Malta had the lowest "n" factor. *Id.*

92. The Commission appears aware that the spring hunting season is only one element of Malta's threat to migratory bird species. See European Commission Press Release, Commission Urges Malta to Refrain From Finch Trapping (16 Oct. 2014), http://europa.eu/rapid/press-release_IP-14-1154_en.htm (last visited Jan. 15, 2016). As part of the framework legislation negotiated with the Malta government over a hunting derogation, the Commission required Malta to provide a number of local hunting marshals to oversee the hunt. Editorial, *supra* note 81.

93. See *Drivers of Biodiversity Change*, MALTA ENV'T & PLANNING AUTH., <http://www.mepa.org.mt/biodiversity-driversofchange> (last visited Aug. 4, 2015) (describing, as a direct driver of biodiversity change, "illegalities due to limited public awareness on nature protection legislation that is in place and on activities that are prohibited by law").

94. See Editorial, *supra* note 81.

the opportunity to shoot—reducing the incentive to kill birds illegally. Second, the revenue from additional hunting licenses⁹⁵ will enable Malta to allocate more resources towards regulating hunters. Such additional revenue may give Malta the incentive to strictly regulate and protect migratory bird stocks. As hunting revenue climbs, the Malta government will become increasingly reluctant to push the derogation envelope, risking an ECJ penalty and Commission-forced shut-down. On the other hand, Malta's required annual justification of derogation necessity⁹⁶ may send the incentives in the other direction. Improved enforcement could increase autumn migratory bird populations to the level where the spring hunt is no longer reasonable, eliminating spring licenses as a revenue source.

2. Cyprus

Though Cyprus has received repeated warnings from the Commission for Birds Directive infringements,⁹⁷ it has not appeared in front of the ECJ. The Commission's reluctance to bring Cyprus before the Court may be the result of Cyprus nominally transposing its national laws with the Directive. Alternatively, it may arise from the Commission's hesitance to stir Cypriot nationalism, adherents of which still view EU accession as "the means by which we were going to solve the Cyprus Problem [of Turkey's occupation]."⁹⁸ Whatever the cause, the Commission's stance may be shifting, resulting from deteriorating conditions on the ground.⁹⁹ Pressures for an infringement proceeding are mounting.¹⁰⁰

Cyprus is currently one step away from an ECJ review for failing to designate sufficient SPAs for its birds. The Commission issued a Reasoned Opinion in late 2009 requiring Cyprus to designate protection for three IBAs and to enlarge six

95. See Kurt Sansone, *Three-week Season Proposed*, TIMES OF MALTA, Mar. 31, 2011, at 7. With more opportunities to legally shoot turtledoves and quails, more hunters will pay for licenses for the spring hunt. Malta's hunting federation has dropped its boycott of hunting licenses, now that the government has allowed a long spring season and increased quotas. *Id.* In 2011, Malta charged 50 Euros for a spring license, in addition to the 150 Euros hunters pay for license fees. *Id.*

96. *Id.*

97. Franzen, *supra* note 1, at 3.

98. *Id.* (quoting Cypriot social anthropologist Yiannis Papadakis).

99. See Cyprus Article 12 Report, *supra* note 1, at 1.2 (finding trapping numbers "remain at unacceptable levels"). In autumn 2010, Birdlife Cyprus recorded a seventy-five percent increase in mist net use and an eighty-nine percent increase in lime-stick trapping over autumn 2009. The increases saw bird-killing activity at its highest rates since Birdlife began monitoring in 2001. Press Release, Melpo Apostolidou, Birdlife Cyprus, "Record" Trapping Levels in Autumn 2010 (Nov. 17, 2010), http://birdlife.bpweb.net/index.php?option=com_content&view=article&catid=38%3AIllegal-bird-trapping&id=371%3Apress-release-nicosia-17th-november-2010&lang=en.

100. For instance, in March 2012 the European Commission referred Cyprus to the ECJ for failing to transpose Directive 2008/99/EC, which requires that states make serious breaches of EU environmental law (including the Birds Directive) criminal offenses and punishable. Press Release, European Commission, Environmental Crimes: Commission takes Cyprus to Court for Failing to Transpose EU Rules (Mar. 22, 2012), http://europa.eu/rapid/press-release_IP-12-296_en.htm?locale=en.

others, or to scientifically justify its shortcomings.¹⁰¹ Further, Cyprus's embrace of private development has led to land use projects within the existing SPAs.¹⁰² The identified shortcomings fall in line with the Commission's expressed intent to pursue non-transposition and non-conformity actions. The Commission's warnings to Cyprus also fit within developing ECJ case law on the Birds Directive. In its outline of the Directive's SPA obligations, *Comm'n v. Greece* required a level of habitat protection necessary for the survival and reproduction of Annex I species.¹⁰³ Cyprus SPAs do not appear to meet the "necessary for the survival and reproduction" threshold. Even though Cyprus ultimately did designate SPAs on British bases to protect birds in 2010, poachers killed a record 900,000 birds in the British base area of Dhekelia in autumn 2014.¹⁰⁴

Yet instead of pursuing protections for migratory birds, the Commission recently initiated an ECJ proceeding against Cyprus for failing to protect its most important remaining site for an endemic species of grass snake.¹⁰⁵ The required SPA site is Paralimni Lake, a highly degraded location that also happens to be identified as an SPA for birds.¹⁰⁶ A location's attribute as an area of special importance for multiple species is not unusual, particularly in a small, rapidly developing county like Cyprus. However, the Commission's focus on the grass snake and the Habitats Directive is instructive. The Commission performs an end-run around the Birds Directive, avoiding nationalist debates over *ambelopoulia* but ultimately protecting a bird habitat. Such a move indicates the bizarreness of the Mediterranean bird problem. First, the EU believes it can best avoid an upheaval of nationalism by prioritizing the protection of *endemic* over *migratory* species. Second, in choosing between charismatic species as a point of entry to enforce overall habitat protection, the Commission prefers a snake to a bird.

The Cyprus government, like Malta's, appears to have tricks up its sleeve. In 2010, it provided licenses to hunters to control migrant bee-eaters.¹⁰⁷ Cyprus justified the derogation as necessary to protect its beekeeping industry.¹⁰⁸ The move indicates that Cyprus may be learning from its fellow island Member State.

101. Press Release, European Commission, Environment: Commission Takes Spain to Court over Nature Conservation Shortcomings, Warns Cyprus and Bulgaria (Nov. 20, 2009), http://europa.eu/rapid/press-release_IP-09-1793_en.htm?locale=en.

102. Press Release, Birdlife Cyprus 2010 (22 Dec. 2010), <http://www.birdlifecyprus.org/en/html-24-Press-releases.html>.

103. Case C-166/04, *Comm'n v. Greece*, 2005, at ¶ 14.

104. *Bases Announce Wildlife Protection Areas*, CYPRUS-MAIL (Jun. 4, 2015), www.cyprus-mail.com/2015/06/04/bases-announce-wildlife-protection-areas/.

105. BirdLife Cyprus, *supra* note 102. Authority for the proceeding is the Habitats Directive, which links with the Birds Directive to create the NATURA 2000 database of SPAs.

106. *Id.*

107. *Id.*

108. Birds Directive Article 9(1)(a) allows derogation of Article 7 "to prevent serious damage to crops, livestock, forests, fisheries and water" and "for the protection of flora and fauna." Directive 2009/147/EC, art. 9(1)(a), http://ec.europa.eu/environment/legal/law/2/module_2_9.htm.

Like Malta, Cyprus has found a hook for derogation and is unilaterally using it to stretch its hunting regulations beyond the normal bounds of the Birds Directive. Following Malta's lead, Cyprus could enlarge the derogation until the Commission finally steps in and negotiates its own state-specific framework legislation. Doing so would advance dangerous precedent for the Commission, which has already emphasized that the Malta negotiations did not create any "agreement" or "deal."¹⁰⁹ The Commission risks morphing into a supranational backstop that incentivizes governments with pro-hunting constituents to push the envelope until the Commission intervenes to set specific limitations. With the Commission's monitoring and information regime already "widely considered to be inadequate,"¹¹⁰ adding the administrative costs of annual state-specific derogation negotiations is a cause for concern.

3. Nationalism Informs the Commission's Different Approaches to Malta and Cyprus

The Commission's differential treatment of Malta and Cyprus is troubling. Both have massive non-application failures under the Birds Directive, but Cyprus has so far escaped the ECJ. Malta leadership has so far been more willing to engage the EU regime, yet it receives more coercive responses from the Commission and the ECJ. A Cypriot may argue that the Commission is properly exercising its enforcement discretion; prosecution would stoke nationalist ire.¹¹¹ As such, the Commission is better off pursuing the tack of bolstering Cyprus's regulatory capacity and altering public attitudes towards hunting and trapping.¹¹² Yet this reluctance to prosecute Cyprus rewards Cypriot intransigence, and suggests that Maltese leadership could loudly object to EU intervention on nationalism grounds to satisfy its hunting constituents and avoid future enforcement.

With regard to Cyprus, one approach to commencing ECJ infringement proceedings without inflaming Cypriot nationalism may be to concurrently prosecute the United Kingdom. The most egregious Birds Directive violations take place on the British military base in Cyprus.¹¹³ As the military is an emanation of the state, its actions create United Kingdom liability for Article 260 fines.¹¹⁴ Such a move would spread the blame by lessening Cyprus's perception

109. See Sansone, *supra* note 95.

110. Hattan, *supra* note 43, at 274.

111. Franzen, *supra* note 1, at 2.

112. BirdLife Cyprus, a strong proponent of enforcement of the Birds Directive, also called for "[c]lear condemnations of trapping from Ministers and other key decision-makers and opinion-formers." See Apostolidou, *supra* note 99.

113. Franzen, *supra* note 1, at 3; see also Apostolidou, *supra* note 99; CYPRUS-MAIL, *supra* note 104.

114. See Joined Cases 46 & 48/93, *Brasserie du Pêcheur Sa v. F.R.G., The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd. and Others*, 1996 E.C.R. I-1029 (finding principle of Member State liability for

that it is being unfairly singled out.

D. OTHER AVAILABLE VERTICAL ENFORCEMENT MECHANISMS BEYOND ARTICLE 260
FINANCIAL PENALTIES

In terms of vertical enforcement, Article 260 penalties are neither the only nor necessarily the best mechanism. Malta and Cyprus are two small countries within the EU suffering an increase in the number of people at risk of poverty or social exclusion,¹¹⁵ so the financial penalty framework risks an overly burdensome response. A penalty has the potential to generate collateral environmental damage by reducing the amount of resources that Malta and Cyprus can deploy towards applying the Birds Directive. Alternative enforcement actions may arise in two ways: either the state subjected to an Article 260 ruling does not pay the fine, or other EU Member States decide to resolve implementation failure outside of an infringement proceeding.

There are numerous alternative enforcement actions available within the EU. First, other states can apply informal pressure to Malta and Cyprus through relevant Parliament Committees. For example, the European Parliament's Environmental Committee successfully influenced Greece to close an unlawful landfill site and pay its penalties through "persistent pressure."¹¹⁶

If informal pressure is insufficient, Member States can ratchet up coercion by threatening to withhold financial payments through the EU Structural and Cohesion aid. Authority for a withholding strategy comes through the Commission, which can hold back funds for operations directly linked to infringements.¹¹⁷ However, withholding structural funds presents the same problems as Article 260 fines—it drains the targeted state's resources, exacerbating its inability to implement the Directive. In fact, deciding not to release structural funds risks an even more deleterious impact. Under Article 260, the state can select from which of its coffers it pays the affirmative penalty; withholding Structural and Cohesion aid will delay or eliminate installing the infrastructure necessary for environmental safeguards.

An even stronger stick is found in the procedures section of the Treaty on the European Union (TEU), where Article 7 enables Member States to exclude or suspend a member from treaty rights.¹¹⁸ The TEU allows such a procedure for

violations of European Community law, "whatever be the organ of the State whose act or omission was responsible for the breach").

115. See *Europe 2020 indicators—Poverty and Social Exclusion*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/Europe_2020_indicators_-_poverty_and_social_exclusion.

116. See Jack, *supra* note 54, at 90.

117. *Id.* at 91.

118. Treaty on the European Union art. 7(2)-(3), Feb. 7, 1992, 1992 O.J. (C. 224/1) (requires proposal by one third of EU Member-States in the Council and a unanimous vote to suspend or exclude).

serious or persistent breaches of EU “core values.”¹¹⁹ As one of the oldest environmental laws, the Birds Directive may be an EU core value. Core values also include “respect for the rule of law,”¹²⁰ so Malta’s or Cyprus’s non-compliance with an ECJ judgment would justify an Article 7 suspension or exclusion. In analyzing this potential mechanism, the meaningful question is whether the EU collectively has the political capital to credibly threaten exclusion and deter Mediterranean free-riding.¹²¹

If the Council decided to suspend membership, Cyprus and Malta would respond with arguments of unfairness. The accused states would point to the disproportionate enforcement of environmental obligations against poorer Member States who have neither the infrastructure for implementation nor the sufficient votes for political protection within EU institutions. Other factors counsel against exclusion or rights suspension. Outside of the Birds Directive, accession carries with it significant environmental benefits.¹²² And a Malta and Cyprus outside of the EU could backslide and entirely eliminate bird protections, creating leakage, where hunters and trappers from other states travel to the Mediterranean to kill species protected in their home states. Environmental gains could become major losses if the Mediterranean states were dropped from EU membership.

In order to provide moral legitimacy for the exclusion threats relating to the Birds Directive, the EU system could provide carrots for remaining within it.¹²³ More developed Member States could provide financial resources and enforcement expertise, along the lines of the Multilateral Fund within the Montreal Protocol.¹²⁴ In fact, the two problems of migratory bird extermination and ozone depleting substances are quite analogous. Both present a north-south divide. In

119. See Stephen Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union’s State-Like Attributes*, 14 U.C. DAVIS. J. INT’L L. & POL’Y 1, 12 (2007) (explaining how a determination of a breach of core values “may lead to suspension of certain membership rights of the violating state, including its voting rights on the Council”). In a footnote, Sieberson describes how TEU Article 7 came “directly” from an episode in January 2000, when “Member States imposed a ‘diplomatic isolation’ on Austria after a far right political leader, Jorg Haider, joined the country’s governing coalition.” *Id.* at n.52.

120. Jack, *supra* note 54, at 91.

121. See Scott Barrett, ENVIRONMENT AND STATECRAFT 326 (2003). Malta and Cyprus free-ride by receiving the commercial and development fund benefits of EU membership without fulfilling their Birds Directive obligations.

122. See generally Lanham, *supra* note 30, at 486 (“Many of the environmental projects that need to be carried out to ensure that Malta remains an environmentally sound country depend largely on funding, which Malta does not currently have.”).

123. Barrett, *supra* note 121, at 324.

124. See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, U.N.T.S. 26369. The Multilateral Fund “was established to assist developing countries meet their Montreal Protocol commitments,” “is managed by an Executive Committee with equal membership from developed and developing countries,” and contributions to the Multilateral Fund come from developed countries. See MULTILATERAL FUND FOR THE IMPLEMENTATION OF THE MONTREAL PROTOCOL, *Welcome*, <http://www.multilateralfund.org/default.aspx> (last visited Jan. 15, 2016).

each case, the southern countries are unable to achieve reductions (in bird kills or in CFC¹²⁵ emissions) on their own, requiring transferred technology and assistance. The Montreal Protocol solved the problem of regulated actors producing CFC products by creating technological alternatives. Here, the problem of regulated actors destroying bird populations will require increasing bird values unrelated to hunting and trapping. Transferred funds and expertise from northern states could help develop SPA networks that would increase such existence values.

V. PRIVATE SUIT AT THE SUPRANATIONAL EU LEVEL

Outside of top-down vertical enforcement through the ECJ, the EU regulatory framework also provides for individual remedies against Member States for their failure to enforce the Birds Directive. This section describes the three strongest alternatives below: (1) a citizen suit against Malta and Cyprus's actions under the Aarhus Convention, forcing the Member States to perform a non-discretionary duty; (2) a citizen suit for damages against Malta or Cyprus for failing to implement an EU law that protects individual rights; and (3) a suit by the Commission acting as an EU natural resource trustee.

A. INDIVIDUAL ACTORS USING CITIZEN SUITS TO PUSH STATE ENFORCEMENT OF THE BIRDS DIRECTIVE

Similar to citizen suit actions in United States environmental statutes, citizens in the EU can litigate against state entities that either directly violate the legislation or fail to perform a non-discretionary duty.¹²⁶ The Aarhus Convention, a United Nations body on public participation, provides institutional structure to support such claims. Both Malta and Cyprus are signatories;¹²⁷ the Convention allows individuals with "sufficient interest" or an "impairment of right" to access a "review procedure before a court of law . . . to challenge the substantive and procedural legality of any decision."¹²⁸ The review procedure applies to govern-

125. Chlorofluorocarbons, or CFCs, are chemicals containing carbon, chlorine, and fluorine used in aerosol sprays, foams, and packing materials. CFCs are known to contribute to the ozone depletion. *James W. Elkins, Chlorofluorocarbons (CFCs)*, in *ENCYCLOPEDIA OF ENVIRONMENTAL SCIENCE* 78-80 (David E. Alexander & Rhodes W. Fairbridge eds., 1999).

126. See Clean Air Act (CAA) § 505(a), 42 U.S.C. § 7661d (a) (1990); Endangered Species Act (ESA) § 11(g), 16 U.S.C. § 1540 (g); see also 5 U.S.C. § 706(1) (2012) (allowing for judicial review of agency action "unlawfully withheld" under the Administrative Procedure Act). Under the EU's Birds Directive, a non-discretionary duty would be failing to deliver a three-year report on national provisions, required by Article 12.

127. See United Nations Treaty Collection, Status of Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [Aarhus Convention] (June 25, 1998), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXVII-13&chapter=27&lang=en.

128. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [Aarhus Convention] art. 9(2), 25 June 1998, 2161 U.N.T.S. 450.

mental decisions that may have a “significant effect on the environment.”¹²⁹ Ultimately, the mechanism aims to nudge compliance through transparency. Through the Aarhus Convention, an EU citizen may initiate a procedure against Malta or Cyprus for failing to fulfill non-discretionary duties within the Birds Directive.

B. INDIVIDUAL SUITS TOWARDS PRIVATE STATE LIABILITY

The EU’s *Francovich* principle allows individuals to recover damages from Member State governments for implementation failure. With its progeny, *Francovich* provides that all three branches of a Member State’s government are amenable to suit.¹³⁰ *Francovich* liability requires three elements: the Directive violated must create individual rights; the content of rights must be ascertainable from the Directive; and a causal link between non-implementation and harm suffered.

Applied to wildlife legislation like the Birds Directive, the hardest *Francovich* condition to prove is individual rights conferral. Often, EU Directives are too insufficiently precise to be “directly effective.”¹³¹ The narrow view of individual standing holds that subjective rights necessary for suit must grant rights to a specific class, not the public at large.¹³²

By contrast, Wenneras presents a “functional approach” to argue that environmental directives do provide room for individual suit. He links the necessary *Francovich* “rights” to procedural competence in national courts, *i.e.*, whether one can sue for state failure to provide an environmental impact statement. The ECJ’s central duty is “ensuring the legal protection individuals derive from Community law.”¹³³ Thus, private state liability fills the gap to resolve Member State breaches when the Commission fails to act. A gap-filling rationale is particularly apt for cross-border regulation like migratory bird protection, which must “be uniformly applied.”¹³⁴

Damages for private liability depend on the clarity and precision of the infringed rule; whether the infringement was intentional and inexcusable; and the positions taken by EU institutions like the Commission.¹³⁵ Damage remedies for *Francovich* liability should support Wenneras’s argument, ensuring the *effet utile*

129. *Id.* at art. 6(1)(b).

130. *See* Case C-224/01, *Gerard Kobler v. Republik Osterreich*, 2003 E.C.R. I-10239; Joined Cases 46 & 48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland*, *The Queen v. Sec’t of State for Transp. Ex parte Factortame Ltd. and Others*, 1996 E.C.R. I-1029; Joined Case 6 & 9/90, *Francovich and Others v. Italian Republic.*, 1991 E.C.R. I-5357.

131. Pal Wenneras, *State Liability for Decisions of Courts of Last Instance in Environmental Cases*, 16 J. ENVTL. L. 329, 339 (2004).

132. *See id.* at 331.

133. C-33/76, *Rewe* (1976).

134. *See Brasserie*, *supra* note 114, at I-1145.

135. *Id.* Note that these are the same factors that affect the “seriousness” coefficient in determining the level of violation in ECJ infringement proceedings brought by the Commission.

of EU law.¹³⁶ Thus, successful claims against Cyprus or Malta should provide compensation for the injury to the natural resource, as well as restoration for damages linked to violating the Birds Directive.

In response to private claims, the island states might argue that *Francovich* liability does not apply to their alleged infringement of the Birds Directive. Pointing to a 1996 Communication, Cyprus and Malta could argue that the Commission believes redress for specific damages should occur in national courts.¹³⁷ Second, they could complain that private suit is a blunt instrument impairing their ability to set priorities in the deployment of scarce resources.¹³⁸ Private liability would exacerbate nationalist fervor by offering more EU intervention into domestic governance—intervention unchecked by Commission discretion.

C. SUIT BY THE COMMISSION ACTING AS A NATURAL RESOURCE TRUSTEE

Another way to resolve the *Francovich* difficulty of conferring individual rights is by using the Commission or a Member State government as a public representative. Like in United States natural resource damages claims, the governmental bodies could act as trustees. By assuming the public trust, the government trustee represents a value that supersedes the “natural resources’ potential value from exploitation by any one individual.”¹³⁹

U.S. Supreme Court Justice Oliver Wendell Holmes provided theoretical support for the state as a natural resource trustee, springing its authority from the “interest independent and behind the titles of its citizens, in all the earth and air within its domain.”¹⁴⁰ But the definition may exclude the Commission, which has no territorial domain. Nor can it snatch natural resource trusteeship from a Member State, for at least in the United States federal system, “the control of the state for the purposes of the trust can never be lost.”¹⁴¹

Policy also advises against Commission trusteeship. A Member State can better balance the interests of its public in bringing suit as a public trustee. For example, Malta can best consider lost bird hunting revenue when bringing a natural resource damages suit. And multiple trustees present conflicting interests, especially when an environmental problem crosses resources held by separate trustees.¹⁴² If a Member State fails wetland protection, then a federal trustee of wetlands-using migratory birds will have no remedy.¹⁴³

136. Wenneras, *supra* note 131, at 332.

137. Borszák, *supra* note 52, at 253.

138. See Stewart, *supra* note 28, at 14.

139. Allan Kanner & Mary Ziegler, *Understanding and Protecting Natural Resources*, 17 DUKE ENVTL. L. & POL’Y F. 119, 127 (2006).

140. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

141. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-53 (1892).

142. Kanner & Ziegler, *supra* note 139, at 131.

143. See *id.*

If the Commission has limited or no authority as trustee, an emphasis on the natural resource trusteeship inherent in Cyprus and Malta may still protect migratory birds. Rather than foment conflict between EU bodies and the island states, an emphasis on state trusteeship could reframe the migratory bird issue as a question of optimal resource use. Reframing may cause Malta to view hunting permit revenue as negatively linked to illegal taking.

On the other hand, the Commission offers trusteeship advantages. It can better assess *all* EU public interests. Further, the prohibition on horizontal enforceability of EU Directives means a Member State has limited natural resource damages claims. EU Directives do not allow private claims against private citizens, so a Member State trustee could only sue an internal entity. This would likely be rare, so trusteeship should lie with the Commission, if at the EU level at all.¹⁴⁴

Were the Commission to successfully sue states for non-implementation, it would have a difficult time determining damages. Should damages include compensatory restoration (lost value in the time between the original damage and court-ordered restoration), restoration alone, or injunctive relief coupled with the transaction costs of litigation?¹⁴⁵ Cyprus highlights the difficulty of these questions: How far back should we look to determine the Cyprus baseline? Should the baseline be based upon Cyprus's accession to the EU or its most pristine condition, which existed before Cyprus's adoption of the 16th Century lime-stick traps?

D. PRIVATE LIABILITY DERIVED FROM THE ENVIRONMENTAL LIABILITY DIRECTIVE

In an attempt to add remedies for environmental damage¹⁴⁶ and introduce the "polluter pays" principle, the EU passed the Environmental Liability Directive in 2004. While the Directive looks like a private liability scheme, it derives its power from the "administrative approach" of public authorities.¹⁴⁷ Liability is strict, and individual operators are required both to take preventive measures and remedy any damage that occurs. The Directive also provides civil society the right to issue requests to the competent authority for preventive or remedial action. If the authority fails to do so, private actors can appeal the decision or omission to a court or individual review body.¹⁴⁸

Biodiversity damage liability is a burgeoning field within EU law; the Environmental Liability Directive covers damage to species protected under the

144. This makes logical sense with legislation like the Birds Directive because the Directive is an EU law, an EU institution is better poised to control the trust associated with the law.

145. *See id.* at 146.

146. The Environmental Liability Directive Preamble includes damages to protected species within the Directive's scope. Council Directive 2004/35, preamble 4, 2004 O.J. (L 143) 56 (EU).

147. *Environmental Liability*, EUROPEAN COMM'N, <http://ec.europa.eu/environment/legal/liability/index.htm> (last visited Jan. 15, 2016).

148. *Id.*

1979 Birds Directive.¹⁴⁹ However, action actually leading to liability under the Environmental Liability Directive will most likely be large-scale harms to Natura 2000 protected areas (SPAs). Individual Maltese and Cypriots shooting and trapping birds are more likely to fit within the “diffuse pollution” exception to liability (either *de jure* or from *de facto* non-enforcement).¹⁵⁰

VI. CONCLUSION

This article’s taxonomy of enforcement mechanisms for protecting migratory birds and their applications in Cyprus and Malta highlights the underlying unique challenges of both the Birds Directive and general EU enforcement. From its 1950 roots the Birds Directive has suffered a democracy deficit—now showcased by the frustrated poorer Mediterranean states.¹⁵¹ Derived from the Paris Convention, the EU adopted the Directive before it assumed shared competence over environmental laws. The six members that adopted the 1979 Birds Directive clearly did not represent (nor knew that they could possibly represent) the 28 Member States over whom the Directive now governs.

Migratory bird advocates may respond that there is no democracy deficit because Malta and Cyprus decided to accede to the EU. Through accession discussions within constituencies and with external EU governance bodies, the Mediterranean island governments knew exactly what obligations they were assuming. But the participation incentives in the EU are extremely imbalanced—the attractions of joining the European market bend to the point of coercion.

Ultimately, the question is how other EU Member States can alter the values within Malta and Cyprus’s populations. Through the tools explained in this article, the Commission and ECJ have the means to enforce implementation failure. Yet political and prudential considerations advise the Commission to tread lightly, which explains why we have yet to see a Birds Directive infringement proceeding against Cyprus. To supplement the Commission, individual citizens should consider suit against Malta and Cyprus. And at minimum, other Member States will have to creatively affect value transformation within Malta and Cyprus. BirdLife’s established presence, SPA advocacy, and engagement with political figures are a good start.¹⁵² But with the instilled culture of Cyprus ambelopoulia and pride over “Maltese plumage,” Mediterranean songbirds still have a long flight to safety.

149. *Id.*

150. *See id.* While the press release describes air pollution as the paradigmatic example, the rationale could equally apply to migratory bird destruction in the Mediterranean: “The Directive does not cover it because it would be ineffective and practically impossible to hold liable all those contributing.” *Id.*

151. The current debt crisis in Greece highlights the imbalance of power between the northern and Mediterranean states. *See* Matt O’Brian, *Germany Doesn’t Want to Save Greece. It Wants to Humiliate Greece.*, WASH. POST, (July 12, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/12/germany-doesnt-want-to-save-greece-it-seems-to-want-to-humiliate-greece/>.

152. *See generally* Franzen, *supra* note 1.